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Supreme Court of the United States

OCTOBER TERM, 1970

No. 436

BERDIE MAE DAVIS, ET AL., *Petitioners,*

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS, MOBILE COUNTY COUNCIL, PARENT-TEACHER ASSOCIATIONS, ET AL.

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OPINIONS BELOW

The Petitioners' brief contains substantially all of the opinions and orders of the Courts below. Therefore, these Respondents will list only some of those orders which were omitted by Petitioners, as follows:

1. District Court order of January 22, 1970, granting these Respondents' Petition to Intervene in this case, unreported.

2. District Court order of July 28, 1970, establishing a Bi-Racial Committee, unreported.

3. District Court order of August 12, 1970, appointing Bi-Racial Committee, unreported.

4. District Court order of August 21, 1970, requiring School Board to report to the Court relative to its action on weekly student transfer requests, unreported.

QUESTIONS PRESENTED

Certiorari was granted by this Court to review the decisions of the Fifth Circuit Court of Appeals on June 8th, August 4th, and August 28th, 1970, which decisions serve as the basis for the school attendance zone plan of Mobile County, Alabama, for the school year 1970-71.

The Writ of Certiorari presents the following questions for consideration by this Court:

(1) Whether a student, black or white, is denied equal protection under the Fourteenth Amendment when such student is assigned to a school near his home within a desegregated, unitary system rather than a school within the system which is more distant from his home simply because of his race or color and to achieve a racial balance in such distant school, and

(2) Whether the above question in this case should be decided on its merits by this Court absent an evidentiary hearing and finding of fact by the District Court on which to base a decision on review?

STATEMENT

I. Preface

Respondents, MOBILE COUNTY COUNCIL PARENT-TEACHER ASSOCIATIONS, ET AL., hereafter referred to in brief as PTA, have reviewed the statement contained in Petitioners' brief filed in this cause and that contained in the brief to be filed in this Court by Respondent School Board. The PTA adopts those portions of the statement contained in Petitioners' brief, save and except those portions which are merely self-serving declarations and those which are purely argumentative, those portions which are inconsistent with and in conflict with the statement contained in brief of Respondent School Board and those portions of Petitioners' statement which are inconsistent with the statement contained hereinbelow.

II. Mobile Data

Geographically, Mobile County is rather large, containing approximately 1248 square miles covering a distance of approximately 53 miles north and south and 27 miles east and west. Likewise, the urban area of Mobile is rather large, containing approximately 155 square miles, measuring 18 miles from north to south and 11 miles from east to west.

A vast majority of the colored community live in a comparatively small area in the extreme eastern portion of urban Mobile. The Mobile County School Board played little or no part in the development of the colored community in the urban area of Mobile County. Schools came after people settled in these areas, not before.

III. School System Data

Attendance in the Mobile County Public Schools over the past five (5) years has decreased by approximately twelve (12%) per cent. During this period, the overall population of the County has increased slightly. It cannot be disputed that this litigation and the attendant chaos, turmoil and never-ending changes in attendance zone plans, attendance zones and student assignments have significantly contributed to the decision of students and parents to abandon the public schools. The toll has been felt among both blacks and whites. Enrollment has dropped from approximately 78,000 in 1965-66 to just over 68,000 in 1970-71.*[1] Over one-half of this loss occurred during the last few months. Also, during the past five (5) years, the public school children, black and white, of Mobile County, who have remained in the system have suffered greatly from the apparently interminable chaos and turmoil. A battery achievement test given within the system reflects a decline of approximately fifteen (15%) per cent in achievement level over this same five (5) years.*[2] Yes, it is the children who are suffering, not the real litigants, the NAACP and the School Board.

IV. Present Desegregation Plan in Operation

The Mobile County School System is now desegregated. Most of this was brought about in the last year. Ironically, there is no evidence before the Court depicting the present status of the Mobile County

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*[1] See statistical table of enrollment for 1965-66 school year and 1970-71 school year, Appendix to this brief, page 1a.

*[2] See statistical table of California Battery Test Scores 1965 through 1970 in Appendix to this brief, page 1b.

School System relative to desegregation which was obtained by evidentiary hearing. The only semblance of such evidence was submitted at the direction of the Court and adopted by the District Court on April 14, 1970 as supplementary findings of facts for the Court of Appeals.*[2]

The Mobile County Public School System has been totally desegregated as to administration and student body. An examination of the following statistical table will illustrate this point:

STATISTICAL TABLE

NAME OF SCHOOL	1970-71 STUDENTS ASSIGNED B	1970-71 STUDENTS ASSIGNED W	1970-71 FACULTY ASSIGNED B	1970-71 FACULTY ASSIGNED W	1970-71 ADMINISTRATORS ASSIGNED B	1970-71 ADMINISTRATORS ASSIGNED W
ADAMS (CLEVELAND)	293	687	16	25	1	1
ALBA	179	1463	25	38		2
AUSTIN	14	384	5	7		1
AZALEA ROAD	35	999	14	24		2
BAKER	94	984	14	26		2
BELSAW (MT. VERNON ELEMENTARY)	209	26	4	3	1	
BIENVILLE**[1]						
BLOUNT	1233	1041	36	41	2	1
BRAZIER	1006		14	17	1	
BROOKLEY	71	490	7	10		1
BURROUGHS	242	188	6	9	1	

**[1] By Court order, Bienville has become a part of the Blount High School Complex, which has an assigned enrollment of 1233 black, 1041 white.

*[2] District Court order of April 14, 1970, to be printed in the Appendix, with affidavit of School Administrator.

Name of School	1970-71 Students Assigned B	W	1970-71 Faculty Assigned B	W	1970-71 Administrators Assigned B	W
Calcedeaver*** 2		168	2	4		1
Caldwell	307	11	6	3	1	
Carver*** 3						
Central	1563	231	24	27	2	
Chickasaw	75	448	6	8		1
Citronelle	367	738	19	31		2
Clark	903	687	23	34		2
Council	404	50	6	8	1	
Craighead	516	242	11	16	1	
Crichton	144	352	7	11		1
Dauphin Island *** 4		20		1		1
Davidson	78	2562	37	66		3
Davis	176	613	9	16		1
Dickson	155	579	9	14		1
Dixon	181	239	5	6	1	
Dodge	62	670	10	14		1
Dunbar	940	86	14	13		2
Eanes	181	823	13	23		2
Eightmile	103	556	9	15		1
Evans	118	91	8	8		1
Fonde	8	662	8	13		1
Fonville	866	15	13	9	1	

*** 2 Calcedeaver is attended by a community of persons of entirely mixed bloodlines and is therefore considered bi-racial.

*** 3 By Court order, Carver has become part of the Blount High School Complex, which has an assigned enrollment of 1233 black, 1041 white.

*** 4 As will be noted, this is a small one teacher school, isolated on an island in the Gulf of Mexico.

Name of School	1970-71 Students Assigned B	W	1970-71 Faculty Assigned B	W	1970-71 Administrators Assigned B	W
Forest Hill		662	6	10		1
Glendale	574	257	10	14		1
Grand Bay	152	667	9	15		1
Grant	1077	7	16	9		
Griggs	40	899	11	17		1
Hall	852	190	18	23	1	1
Hamilton	204	414	7	11		1
Hillsdale	228	493	12	17	1	1
Hollinger's Island	4	391	5	7		1
Indian Springs	11	507	6	9		1
Lee	159	641	10	16		1
Leinkauf	252	194	6	8		1
Lott	132	413	8	11	1	
Maryvale	207	395	8	12		1
Mertz		373	4	7		1
Mobile County High	259	624	13	22		2
Mobile County Training	699	202	14	8	2	
Montgomery	30	815	10	24		2
Morningside		674	8	11		1
Mount Vernon	318	80	5	4		1
Murphy	1546	1054	31	58		3
Old Shell	357	117	5	6		1
Orchard	113	758	10	15		1
Owens	1479		20	13	1	
Palmer (Snug Harbor)	493	104	10	5	1	
Phillips	820	364	18	28		1

Name of School	1970-71 Students Assigned B	W	1970-71 Faculty Assigned B	W	1970-71 Administrators Assigned B	W
Prichard	566	187	12	19	1	1
Rain	111	1155	23	35		2
Robbins	702	129	9	12	1	
St. Elmo	49	426	8	11	1	1
Saraland	35	759	9	13		1
Satsuma	198	919	17	30		2
Scarborough	11	773	13	19		2
Semmes	23	989	13	23		2
Shaw	228	1293	21	38		2
Shepard	26	418	4	8		1
Stanton Road	894	4	13	17	1	
Tanner Williams	9	345	3	7		1
Theodore	339	1516	25	47		2
Thomas	74	160	3	5		1
Toulminville	454	247	12	14	2	
Trinty Gardens	969	171	15	17	2	
Vigor	1385	930	36	60	1	2
Washington	780	636	14	11	2	
Westlawn		322	4	7		1
Whistler	160	227	6	11		1
Whitley	345	127	6	7	1	
Will	160	652	7	13		1
Williams	41	533	8	11		1
Williamson	570	594	18	25	1	1
Wilmer	54	349	4	9		1
Woodcock	97	145	5	10		1

The Courts have examined several aspects of a school system to determine if it has been converted from a

dual system to a unitary, non-racial system. Faculty and staff; transportation; extra curricular activities and sports; facilities; school construction; consolidation and site selection; student transfer policy; and student body composition.* [4] The Mobile County School System has been converted from a dual school system of the early sixties to a unitary school system of today.

To accomplish this, the School Board has, at times, been required by the Courts to close schools, utilize facilities which are inadequate to accommodate assigned grade structures, and in some cases, underutilize facilities to accommodate assigned grade structures, gerrymander attendance zones in such a way that students of both races were required to bypass several existing schools more convenient to their homes in order to attend their assigned school, and pair schools which pairing has severely inconvenienced students of both races. All of the techniques and devices have been instituted and changed on numerous occasions throughout the school year to the utter dismay of the parents and teachers of both races. As a result, the 1969-70 school year ended in utter chaos and turmoil and the 1970-71 school year began on the same note.

(1) Faculty and Staff Conversion--

Faculty integration has increased sharply since August 1, 1966, when the Court first ordered faculty integration. At the conclusion of the 1968-69 school year, all but three of the ninety-one schools of the

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* [4] *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Circuit, en banc, December, 1969); and *Ellis* v. *Board of Public Instruction of Orange County*, 432 F. 2d 203 (5th Circuit, 1970).

Mobile County School System had integrated faculties.*[5]

During the 1969-70 school year, every school in the system had a bi-racial faculty except one small school which had only one teacher.*[6] The statistical table on the preceding pages of this brief (pages 5-8), is a detailed presentation of the racial make-up of the faculty and school administrators assigned to the various schools in the system for the 1970-71 school year.

(2) Transportation

There are substantial numbers of school buses in operation by the School Board to transport students in the rural areas of the system, as well as a few buses to provide transportation for a small number of students residing in remote outlying areas of the urban part of the system.

Where transportation is provided, it serves specific geographic attendance zones approved by the Court of Appeals, *Singleton* v. *Jackson,* 419 F. 2d 1211, on a bi-racial and desegregated basis. School buses are routed in such a manner as to transport all students in each attendance zone to the school serving that zone on a bi-racial basis. The same quality and extent of transportation service is provided without regard to the race of the students living in the area served.*[7]

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*[5] Findings of Fact, October 13, 1969, paragraph 23; and Faculty Report to the District Court, December 3, 1968, respectively.

*[6] Findings of Fact, April 14, 1970. Attachment thereto.

*[7] Findings of Fact, April 14, 1970, pages 9-10; and see Petitioners' brief at page 6.

(3) Extra Curricular Activities and Sports

All extra curricular activities and sports under School Board control have been operated on a desegregated basis throughout the system for several years.* [8]

All athletic teams at every school are open to every student regardless of race. During the 1969-70 school year, several schools fielded bi-racial ball teams. In regular season play, and in tournament and play-off competition, events are conducted on a desegregated basis.* [9]

Bands and other musical groups, ROTC units, speech and other academically related competitions, clubs and organizations, school related social events, parent related activities such as Parent-Teacher Associations, and spectator events are desegregated.* [10]

(4) Services, Facilities and Programs

All facilities are made available to all schools in the system without regard to the racial composition of the schools. Within each individual school of the system, all facilities are made available to all students on an equal basis, regardless of race. These include: restrooms, lunchrooms, classrooms, laboratories, gymnasiums, libraries, laboratories, playing fields; and include services and programs such as band, orchestra, choral groups, clubs, counseling services, student governments, honor societies, publication staffs, intramural sports, assemblies, class elections and honors, parties and social events and every other facility, ac-

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* [8] Findings of Fact, October 13, 1969, paragraph 22 . . . and Findings of Fact, April 14, 1970, pages 14-15.

* [9] Findings of Fact, April 14, 1970, pages 14-15.

* [10] Findings of Fact, April 14, 1970, page 15.

tivity and program of every school.*[11] And actual participation on a bi-racial basis by students is substantial.*[12]

(5) Transfer Policy

The transfer policy now in use, including a majority to minority transfer provision, was formulated by the Court itself.*[13]

(6) Bi-Racial Committee

On August 4, 1970, the Court of Appeals recognized the real need for a bi-racial advisory committee. It said:

> "We are left with the feeling that this case would not again be here if the revisions had been considered by a bi-racial advisory committee. We directed in our decision of June 8, 1970 that the promulgation and maintenance of zone lines be a matter, among others, for consideration by the bi-racial committee."

On August 12, 1970, the District Court appointed a Bi-Racial Committee to advise and assist the School Board and the Court in the operation and maintenance of a unitary system. The Committee was made up of five black members and five white members.*[14]

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*[11] Findings of Fact, October 13, 1967, paragraph 22, and Findings of Fact; April 14, 1970, pages 16-18.

*[12] Findings of Fact, April 14, 1970, pages 17-18, and Report to the Court, February 24, 1970.

*[13] Findings of Fact, April 14, 1970, page 23.

*[14] At the request of Petitioners, the Court has enlarged the Committee to consist of seven black members and seven white members.

(7) Student Assignment

Every student in the system is assigned to a school within geographic attendance zones as ordered by the Courts. However, several elementary schools have been paired within zones for the 1970-71 school year. Reference is again made to the statistical tables at pages 5-8 of this brief. However, these Court ordered zones are not along the neighborhood school concept, nor may they be said to be educationally sound. They certainly are inconvenient to the students and parents, black and white, alike.

V. The Desegregation Process

There is little doubt that in the early 1960's a dual school system was operated in Mobile County. There is also little doubt that with persistent prods from the Courts, this situation has changed radically and in 1970 Mobile County is operating under a unitary school system.

Geographic attendance zones were drawn for the 1962-63 school year on racial bases with overlapping zones for the respective races. This is the era most dwelt on by Petitioner when reason is eluding them.

As a result of the action filed in the District Court, the School Board was directed by the Courts to begin the 1963-64 school year with desegregation of the system on a one grade a year stair-step plan.* [15] The Board commenced to comply with the Court's orders. Further relief was sought for the school year 1964-65, resulting in orders from the District Court and the

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* [15] *Davis* v. *Board of School Commissioners of Mobile County*, 318 F.2d 63; *Davis* v. *Board of School Commissioners of Mobile County*, 322 F.2d 356.

Court of Appeals, directing the Board to speed up the stair-step desegregation plan to two grades per year rather than one.* [16]

In accordance with the Court's order to eliminate dual attendance zones within the system, the Board did away with dual zones for the year 1965-66 by redrawing the zones but maintained the basic neighborhood school concept and produced a set of unitary zones with the option in the students to attend the school nearest their home.

On August 16, 1966, the Court of Appeals ordered the attendance plan modified.* [17] Among other changes, the student option was eliminated. The School Board began compliance with the Court order for further desegregation.

In March 1967, the United States Department of Justice was permitted by the District Court to intervene. The District Court held an exhaustive evidentiary hearing over a period of several weeks during July and August and found: * [18]

> (1) That there was no evidence of discrimination by race in the administration of the desegregation plan.
>
> (2) That all services, facilities, activities and programs of the school system are available to every student and to every school in the system,

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* [16] *Davis* v. *Board of School Commissioners of Mobile County*, 333 F.2d 53.

* [17] *Davis* v. *Board of School Commissioners of Mobile County*, 364 F.2d 896.

* [18] District Court order of October 13, 1967, reported at 12 Race Rel. L. Rep. 1820.

without reference to race, including: restrooms, lunchrooms, special facilities and equipment, athletic teams, bands and choral programs, clubs and student groups, counseling, honor societies, dances and other social activities.

(3) That the defendant had formulated a specific plan for faculty desegregation, had commenced faculty desegregation, and had made sufficient and proper effort in the prevailing circumstances.

(4) That all staff and staff activities are integrated.

(5) That the Board had instituted remedial programs for the benefit of black students in the system, receiving the commendation of the Office of Education of HEW.

(6) That the Board had voluntarily undertaken several school consolidations, resulting in the closing of all black schools and the consolidation of the black students into schools that were either all white or predominantly white.

(7) That the Board was following a policy of constructing, renovating and maintaining schools without regard to race.

(8) That furnishings, fixtures, equipment, facilities, textbooks, supplies, allocated funds and courses of study are allotted to all schools without regard to race.

(9) That no complaint had been made to the Court by anyone as to discriminatory action of the Board in administration of the desegregation plan.

The record discloses no subsequent findings of fact to the contrary on any of these particular points.

However, on March 12, 1968, the Court of Appeals returned the case to the District Court with instructions for the Court to order the School Board to redraw the attendance zone lines on what the school officials conceive to be a "nonracial basis".* [19]

Then, in July 1968, the Court held another evidentiary hearing where the Justice Department and the Petitioners presented their own separate proposed zone lines for the urban portion of the school system. This hearing resulted in a decree allowing the so-called "freedom-of-choice" in portions of the system.* [20]

On June 3, 1969, the Court of Appeals again reversed the District Court stating in part, that statistically, the desegregation in that portion of the system under freedom-of-choice was unacceptable.* [21]

The Court of Appeals remanded and directed the Court to request the Office of Education to collaborate with the School Board in the preparation of a revised plan of student assignment. The District Court did not have a hearing and the School Board filed affidavit testimony in the Court on July 29, 1969, in support of its objections to the plan submitted by HEW.* [22]

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* [19] *Davis* v. *Board of School Commissioners of Mobile County*, 393 F.2d 690, 696.

* [20] Decree of the District Court, July 29, 1968.

* [21] *Davis* v. *Board of School Commissioners of Mobile County*, 414 F.2d 609.

* [22] The Affidavit of James A. McPherson filed in the District Court on July 29, 1969.

The District Court entered its order on August 1, 1969, which rejected in part and accepted in part the respective recommendations of HEW and the School Board and delayed further desegregation east of the Interstate Highway 65 for one year. Petitioners appealed from the District Court order of August 1st. However, the Justice Department did not appeal. The Court of Appeals sustained the District Court order of August 1, 1969.*[23] Upon certiorari to this Court, the Court of Appeals was reversed, and the case remanded for further proceedings consistent with *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19.*[24]

Contrary to what is stated in Petitioners' brief (page 9), where PTA is referred to as a group of white parents who intervened ". . . to press for adoption of freedom of choice plans . . ." PTA is integrated; and PTA in its Petition advanced positions of (1) neighborhood zones and (2) antibussing to achieve racial balance, both of which are consistent with the equal protection clause of the Fourteenth Amendment. The Petition to intervene filed by PTA was not granted by the District Court until January 22, 1970, although it was filed six months earlier.*[25] The District Court on January 31, 1970, entered its Decree setting out attendance zone lines for implementation as soon as practicable in that urban portion of the system lying east of Interstate Highway 65, (All other areas in

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*[23] *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211.

*[24] *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970).

*[25] See Appendix of this case . . . District Court order of January 22, 1970.

the system were desegregated). This Decree also added a majority to minority transfer provision. By March 20, 1970, the School Board had completed implementation of the District Court order of January 31, 1970. Appeals were then filed by Petitioner and the Justice Department, and a cross appeal by the School Board. On April 14, 1970, supplemental findings of facts were made by the District Court. The School year ended in virtual chaos, confusion, boycotts by white and black students, massive absenteeism, racial disorders in some schools, large scale residential relocation, and upsurge of school vandalism, defiance of school authorities, the Court, and law enforcement officials by parents and students, and large scale disruption of the normal educational process in general. The relative calm of the hot summer came.

However, on July 8, 1970, the Court of Appeals, pending appeal, rendered an opinion setting forth a new plan of student assignment for that part of the urban portion of the school system lying *east* of Interstate Highway 65 which plan had been exhibited to the Court by the Justice Department.*[26] This plan called for "neighborhood" school zones with some stretching of that term and the zone lines to achieve racial balance.

And, on June 12, 1970, the District Court entered its order requiring the School to implement the new plan set out by the Court of Appeals and it was well publicized through the local media, including zone maps being printed.

On July 13, 1970, the District Court entered another order which, in essence, set out a still further and

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*[26] *Davis* v. *Board of School Commissioners of Mobile County*, 422 F.2d 1139 (1970).

different plan of student assignment for the area east of Interstate Highway 65, which also affected area elsewhere in the system. For the second time in five weeks, the public was advised that the school system was under an entirely new desegregation plan. These changes were also well publicized and zone maps were printed in the news media.

On July 30, 1970, the District Court entered still another order modifying over one-half of the attendance zones in the urban part of the system. These changes were likewise publicized with zone maps. Parents and students were justifiably confused.

On August 17, 1970, Petitioner filed a belated appeal and sought summary reversal.* [27] This point was raised to no avail by this counsel and School Board counsel.* [28]

Nevertheless, the Court of Appeals entertained the appeal and the motion. In fact, on August 24, 1970, a prehearing conference was held in Chambers by the Judge of that Court without notice to this counsel. This counsel had no knowledge of this conference and was not present.* [29]

On August 28, 1970, the Court of Appeals rendered an opinion which partially granted and partially denied the Motion For Summary Reversal, required certain further rearrangement of attendance zones within

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* [27] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, limited appeal time to fifteen (15) days.

* [28] Petition for Rehearing and For Stay, filed by the Intervenor, Mobile County Council PTA, on September 4, 1970; denied on September 18, 1970.

* [29] Affidavit of counsel attached to Petition for Rehearing and For Stay, filed by this Respondent on September 4, 1970.

the system. Again, with the opening of school only a few days off, the public was informed of the substantial rearrangement of attendance zones of the school system. Again, the local media carried the zone maps.

On September 9, 1970, the 1970-71 school year commenced amid the chaos of a plan of student assignment pieced together at various times by the District Court, HEW, a Justice Department attorney, the Court of Appeals, and who knows. In essence, this school year opened as the past year had closed; boycotts by black and white students and parents objecting to forced assignments, massive absenteeism, (first day enrollment 62,094, down approximately 11,400 from the end of school last year), defiance of school authorities, racial disorders in several of the schools, numerous arrests of students, and large scale disruption of the normal educational process.

Now the judgment of the Court of Appeals rendered on June 8, 1970, as amended by orders of that Court on August 4 and August 28, respectively, are before this Court on review. Public education in Mobile County, Alabama hangs in the balance.

V. Summary

The School system has now been fully and affirmatively desegregated in every aspect. The only complaint put forth in this review deals with student assignment within a part of the system. In that regard, the rural part of the system and the urban part of the system west of Interstate Highway 65 have been fully and affirmatively desegregated since September 1969 by the plan of student assignment for those respective parts devised by the District Court,

approved by the Court of Appeals, en banc, (*Singleton* v. *Jackson,* 419 F. 2d 1211) and reviewed by this Court on certiorari (*Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 per currium, 1970). The method of student assignment used in each of these two approved parts of the system is unitary attendance zones drawn by the Court itself. The fault found by this Court earlier this year dealt primarily with the delay in implementation of a plan east of Interstate Highway 65.

Therefore, the principal issue now before this Court on review relates only to student assignment for that part of the urban portion of the system lying *east* of Interstate Highway 65.

The statistical table set out in an earlier section of this brief (pages 5-8) shows in detail the assignment of students for the whole system produced by the total desegregation plan the last part of which was placed in full implementation with the opening of school on September 9, 1970, pursuant to the Court of Appeals opinion of June 8, 1970, as subsequently amended by that Court.

Petitioners contention seems to be that despite the fact that this is a unitary school system, further action must be taken to achieve racial balance in each school within the system; and this abnormal action is justified because the School Board had, in years gone by, used certain techniques to maintain segregation which were justly condemned, and thus discontinued. When Petitioners' only justification for this abnormal action to achieve racial balance is to point to the shameful techniques used to maintain segregation in an era now dead, their true motive comes into question. Is it retribution?

SUMMARY OF ARGUMENT

I.

The plan for the Mobile County School System approved by the Court of Appeals is a "unitary system" and comports with the equal protection clause of the Fourteenth Amendment as applied to the children in the System. *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232 (1970).

The plan in Mobile County has been measured by criteria suggested by the Court, i.e. composition of student bodies, faculty, staff, transportation, extracurricular activities and facilities. *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), *Ellis* v. *Board of Public Instruction of Orange County, Florida,* 423 F.2d 203 (1970), *Davis* v. *Board of School Commissioners of Mobile County, Ala.,* 5 Cir., No. 29,332, slip opinions dated June 8, August 4, and August 28, 1970.

The sole test of a unitary desegregated school system should not be "the achievement of specified ratios". A school system of the urban-rural type such as Mobile County with large, densely populated urban area and a wide variety of peoples, cannot be administered in a rigid, inflexible manner. *U.S.* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969).

Desegregation does not require racial balance in each classroom, grade and school. If a child attends a school in a "unitary school system" he has been accorded the guarantees due him by the Constitution. *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Green* v. *County School Board of New Kent County,* supra. To go further than is Constitutionally sanctioned and

require racial balance in schools, grades, and classes may well result in resegregation in Mobile County as well as many other parts of the South. The dual school system has been abolished in Mobile County, and the present Appellate Court ordered plan here on review which requires assignment of children to the schools within the system goes beyond the requirements of the Fourteenth Amendment and the cases of *Brown, Alexander* and *Northcross,* supra.

II.

Racial balancing as advocated by Petitioners is not constitutionally permissible. The right guaranteed by the Fourteenth Amendment is a personal, present and unqualified constitutional right to be neither excluded from a particular school within a system because of race, nor required to attend a particular school because of race. *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

The position urged by Petitioners would require the assignment of children to public schools *solely* on the basis of their race. The Constitution imposes no such duty on the States. *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387 (6th Cir. 1969), *U.S.* v. *Jefferson County Board of Education,* 380 F.2d 385 (5th Cir. 1967), per curiam opinion. Therein at pages 405-406 the Court said:

> "When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly . . . embrace."

Petitioners in brief simply misapply the Constitutional imperatives of the prior mandates of this Court. Their call for a student assignment criteria based solely on race clearly violates the Fourteenth Amendment. Their justification, as you may, stems from the fact that segregationists violated the Constitution to achieve segregation. Petitioners "are not the only children who have Constitutional rights." *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387 (6th Cir. 1969).

Mobile County school system covers a vast and diverse area and to require racial balancing, quotas, or ratios would violate the Constitutional personal rights of many school children (i.e. the right not to be excluded from or forced to attend a particular school solely on the basis of race). *Alexander,* supra, and *Northcross,* supra.

III.

Petitioners misconstrued the mandates of this Court in urging that "*Every* black child is to be free from assignment to a 'black' school . . . at every grade of his education." *Brown I, Brown II, Green,* and other recent cases.

The test, i.e. absolute unworkability, Petitioners suggest in evaluating a school to determine whether it is complying with the general principle above stated is a rigid, inflexible rule that is neither Constitutionally required nor educationally sound. In reality it is a blanket requirement for precise racial balance. No school board could carry the burden of proof this test implies in this day and age. With modern technology and sufficient funds, very little is "absolutely unworkable".

The principles Petitioner urge are unrealistic, unworkable, and will lead to further tumult and chaos in southern schools.

PTA urges adoption of a set of legal principles consistent with the Constitutional definition of "desegregation" found at Section 2000c(b) of Title 42, U.S.C.A. These principles would protect all children, regardless of race, from assignment to any school solely on the basis of their race.

ARGUMENT

I.

THE PLAN FOR THE MOBILE COUNTY SCHOOL SYSTEM BEFORE THIS COURT FOR REVIEW ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS PROMULGATES A "UNITARY SCHOOL SYSTEM" WHICH DOES NOT DENY NEGRO CHILDREN EQUAL PROTECTION OF THE LAWS.

Based on the factual and statistical data contained in this brief and that of Respondent School Board, it is submitted that the plan approved by the orders of the Court of Appeals now on review before this Court in effect in Mobile County has resulted in a "unitary system".

This Court in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, 20, 90 S. Ct. 29, 30, 24 L. Ed. 2d 19, 21 (1969), has defined a "unitary school system" as one in which "no person is effectively excluded from *any* school *because* of race or color." (Emphasis supplied). See also the concurring opinion of the Chief Justice Burger in *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232, 25 L. Ed. 2d 246, 250-251 (1970).

In *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 20 L. Ed. 2d 716, 722, 88 S. Ct.

1689 (1968), this Court, in evaluating a system that had separate "white" and "negro" schools as did the dual system before the Court in *Brown I*, said,

> "Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools, but to every facet of school operations—faculty, staff, transportation, extra curricular activities and facilities."

The Fifth Circuit Court of Appeals in *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 423 F.2d 203, 204 (1970), construed this paragraph as containing appropriate criteria by which to evaluate a school system in determining whether it is in fact a "unitary system".

Mobile is operating a unitary system when measured by these criteria. The system has literally been "drawn and measured" by the Courts at one level or another.[* 30]

The Court of Appeals in its order of June 8, 1970 corrected the remaining deficiencies with regard to

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[* 30] *Singleton* v. *Jackson Municipal Separate School District*, 5 Cir., 1969, 419 F. 2d 1211 (en banc consideration of Mobile case and 12 additional school desegregation cases); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 5 Cir., 1969, 414 F.2d 609; *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 5 Cir., 1968, 393 F. 2d 690; *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 5 Cir., 1966, 364 F. 2d 896; *Davis* v. *Board of School Commissioners of Mobile County*, Ala., 5 Cir., 1964, 333 F. 2d 53; *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 5 Cir., 1963, 322 F. 2d 256; *Davis* v. *Board of School Commissioners of Mobile County*, Ala., 5 Cir., 318 F. 2d 63; *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 5 Cir., 1970, 422 F. 2d 1139; *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 5 Cir., No. 29,332, slip opinions dated June 8, August 4, and August 28, 1970.

faculty and staff by directing the District Court "to require strict compliance with the *Singleton* v. *Jackson* rule for faculty and staff on or before July 1, 1970." As the statistical data contained herein (pages 5-8 of this brief) and in the brief of the Respondent School Board indicates, there has been substantial compliance. Substantial compliance is all that is required. *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968); *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); *Singleton* v. *Jackson,* 419 F.2d 1211; and *Ellis* v. *Board of Public Instruction of Orange County,* 423 F.2d 203.

As this Court has said regarding faculty and staff consist, "Compliance should not be tested solely by the achievement of specified ratios." *U.S.* v. *Montgomery County Board of Education,* 395 U.S. 225, 23 L. Ed. 2d 263, 272 (1969). In the light of this decision, it becomes clear that the sixty (60%) per cent white and forty (40%) per cent black ratio of faculty and staff imposed on Mobile County by the Fifth Circuit Court and by the District Court is a "rigid or inflexible" ratio not heretofore sanctioned by this Court. There is no place for such rigidity or inflexibility in the administration of a school system such as the one of Mobile County. The size of the County (1258 square miles), the variety of her people, the differences in the educational needs at each school, and the overall complexity of an urban-rural system combine to make flexibility a must in responding to the educational needs of the children. Today, chances are that southern school boards that fail to achieve the precise ratio of Negro to white faculty or staff is presumptively in non-compliance with some court order. The result is that school administrators are more concerned with

racial balances than with education. That seems to be the case at least in Mobile County where the results of a standard achievement test indicates that the level of the attainment of students tested systemwide is now approximately fifteen (15%) per cent lower than five (5) years ago. (See appendix page 1b).

As to transportation, facilities, and extracurricular activities, the Circuit Court in its order of June 8, 1970, (slip opinion, page 6) noted that "The facts also demonstrate that all extracurricular activities and facilities are operated on the same basis. Indeed there is no complaint regarding transportation, facilities and extracurricular activities." Despite this, the Appellate Court directed the District Court "to enter an order requiring the continued desegregation of facilities and extracurricular activities and to include the requirements of *Singleton* v. *Jackson,* supra, as to transportation, school construction and school site selection as a part of the order." In its order of June 12, 1970, the District Court directed the School Board to comply.

The plan for student assignment on review in this Court was approved by the Fifth Circuit Court in three orders entered this summer. In its June 8, order, it approved the Department of Justice plan as modified. In so doing, the Court (at page 8, slip opinion) said,

> "We conclude that the Department of Justice plan, as hereinafter modified, must be invoked. By way of modification, it will be necessary to desegregate the one all Negro high school—Toulminville. It appears from maps of record that the zone line between Murphy high and Toulminville high can be redrawn so as to include some of the students living in the area of the Crichton elementary school. Some of these students appear to reside nearer Toulminville than Murphy. In addition,

the Department of Justice plan must be modified to close the Emerson elementary school (soon to be eliminated in an urban renewal project). This school would have an all Negro student body under the Justice Department Plan. The 450 students who would be assigned to Emerson are to be assigned as follows: 200 to Council, 200 to Caldwell and 50 to Lienkauf.

"This will leave only 8 Negro student body schools (all elementary), with 25 per cent of the Negro students assigned thereto (7,725 instead of 18,623), and every Negro child in the Mobile system will attend school in a desegregated junior high and high school on a *neighborhood basis.*" (Emphasis supplied).

In explaining the continued existence of a number of all negro schools, the Court of Appeals said, (slip opinion pages 9-10):

"From the standpoint of demography, a majority of the Negro population in the Mobile School system is situated in a concentrated area within the City of Mobile to the east of Highway I-65. The all Negro student body schools which will be left after the implementation of the Department of Justice plan as modified, are the result of neighborhood patterns. This condition can be further alleviated through a majority to minority transfer policy and through the functioning of a biracial committee. The student assignments in the school system depend on zone lines which are drawn on a discretionary basis and therefore may be subject, in some instances, to abuse and in other, to improvement. The proper administration of zone lines depends upon good faith in establishing and maintaining the lines as well as continuing supervision over them."

A biracial committee has been appointed by the District Court and is functioning, as directed by the Court

of Appeals by order of June 8, 1970, (slip opinion, page 10):

> "The district judge is also directed to require that the biracial committee serve in an advisory capacity to the school board in the areas of operation of the majority to minority transfer rule, the promulgation and maintenance of zone lines, and in school site location."

In addition, the District Court was "directed to require the majority to minority transfer rule of *Ellis* v. *Orange County*. All transferring students must be given transportation if they desire it and the transferee is to be given priority for space."

The District Court in its order of July 13, 1970, directed the School Board to implement this plan after making corrections occasioned by statistical inaccuracies. When the matter was again reviewed by the Appellate Court on August 4, 1970, these revisions were found acceptable, save for the pairing of three (3) sets of schools.

On July 30, 1970, the District Court again revised the plan which revisions were affirmed in part and reversed in part by the Appellate Court in its order of August 28, 1970. The result then is an approved unitary, non-racial plan of student assignment.

We submit that Mobile has a unitary school system.

Petitioners' position in short seems to be that "desegregation" means that each classroom of each school will contain the same ratio of Negro to white students as the ratio of Negro students to white students in the system as a whole. This concept of the term is inconsistent with that of Congress:

> " 'Desegregation' means the assignment of students to public schools and within such schools

> without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." * [31]

Similarly, this Court has elaborated on the right of a Negro child and the obligation of the State to such child under the Fourteenth Amendment. *Brown I* held that States which maintain *dual* school systems deprive Negro children of the equal protection of the laws. *Brown II* placed the affirmative duty on the States to eliminate such *dual* school systems. The emphasis in these decisions is on the *dual* nature of the *systems.* In *Green* v. *County School Board of New Kent County,* 391 U.S. 430, (1968); this Court said:

> "It was such dual *systems* that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* 'to effectuate a transition to a *racially nondiscriminatory school system*' . . . " *Id.* at 435. (Emphasis added).
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> ". . . *Brown II* commanded the abolition of such dual systems . . ." *Id.* at 437. (Emphasis added).
>
> "School Boards such as the Respondent then operating State-compelled dual systems were nevertheless clearly charged with the affirmative duty . . . to convert to a *unitary system* in which racial discrimination would be eliminated root and branch . . . . The constitutional rights of Negro school children articulated in *Brown I* permit no less than this . . . " *Id.* at 437-38. (Emphasis added).

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* [31] The Civil Rights Act of 1964, Pub. Law. 88-352, Title IV, Section 401; 78 Stat, 246, 42 USCA (Chapter 21) Section 2000c(b), in part.

More recently, this Court has defined the constitutional requisite of a unitary school system as one "within which no person is to be effectively excluded from any school because of race or color". *Alexander* v. *Holmes,* 396 U.S. 19, 20, 24 L. Ed. 2d 19 (1969). This definition requires consideration of the system as a whole.

If, in viewing the system as a whole, no child is "effectively excluded because of race or color," then the system is unitary and constitutionally sound, or the concluding language of both directives of *Alexander* does not mean what it says.

There is no real comparison between the Mobile County school system and the *dual* systems before the Court in *Brown I* and *Green.* Mobile County is operating a "unitary system". Each school is not precisely racially balanced and this is the apparent goal of the Petitioners. In their zeal to reach this goal of total integration, (i.e. integration based on a strict ratio of Negro to white in a given community or school district), Petitioners are effectively diminishing any real possibility for permanent integration.

It has been said that "to have any permanent integration, you cannot have too much . . ." * [32]

To achieve total integration (balancing), the goal of the Petitioners, mass cross-bussing of children within the system is sought by Petitioners. Their justification is that "southern school boards" bussed children in the past for the "immoral" purpose of maintaining a *dual* system, therefore, bussing should

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* [32] T. W. Thaggard, Jr., "The Making of a Civil Rights Case: Jones v. Alfred H. Mayer Company", 30 Alabama Lawyer 438, 457 (1969).

be utilized for what Petitioners consider a "moral" purpose, of attaining racial balance.

The Court of Appeals order here on review sought through gerrymandering to achieve in as many schools as possible a maximum racial mix. By doing so, the Court of Appeals proposal exceeds Constitutional imperatives. The compulsion of court orders cannot be employed to coerce a public school system to do what the Constitution clearly does not require.

The Court of Appeals approved plan is reinforced by majority to minority transfers to promote stable desegregation, prevent resegregation, and afford blacks that remain in the few remaining predominately black schools an opportunity to attend a predominately white school with free transportation to accomplish this move. The teachers under its plan at each school are assigned on a ratio of 60% to 40% which is the ratio of white to black teachers in the entire system. The staff, extracurricular activities, transportation, facilities, programs and other facets of the system under its plan are nondiscriminatory and thoroughly desegregated. The Court of Appeals plan effectively establishes a unitary system. Therefore, Petitioners' insist on a proposal designed to racially balance each school, with the consequent bussing and movement of children that the school board considers unnecessary, impractical, costly, disruptive, educationally unsound and not required by the Constitution.

To seriously propose racial balance in each classroom and each school is to ask the Court to ignore reality.

If this Court sanctions racial balance, achieved by mass cross-bussing of children, the result will be reseg-

regated school systems. Simply stated, the whites will flee. As we have shown, the withdrawal process has already started. (Appendix hereto, page 1a). It is the sincere hope of PTA that public education can survive in Mobile County and in other parts of the South. This hope will become a reality if this Court meant what was said in *Alexander* v. *Holmes, supra,* that "no person is to be effectively excluded from any school because of race or color". It is respectfully suggested that public education cannot survive if the great majority of the people withdraw their support. The special responsibility of this Court is to make "the great generalities of the Constitution" * [33] correspond with reality.

II.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS RACIAL EXCLUSIONS BY ENFORCED SCHOOL ATTENDANCE TO ACHIEVE ANY PARTICULAR BALANCE, QUOTA, OR PERCENTAGE RATIO ON THE BASIS OF RACE IN ANY MOBILE COUNTY PUBLIC SCHOOL.

All the parties and the Courts, at all levels, should agree that every child, regardless of race, attending the Mobile County Public schools, has a personal, present and unqualified constitutional right to be neither excluded from a particular school within the system because of his race, nor required to attend a particular school because of his race. *Brown* v. *Board of Education,* 347 U.S. 483 (1954). In *Brown I,* supra, p. 494-495, this Court in recognizing that right, explained:

> "To separate them from others of similar age and qualifications *solely* because of their race generates a feeling of inferiority as to their status in the

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* [33] Benjamin J. Cardozo, "The Nature of the Judicial Process", (Yale ed. 1921) 17, 76.

> community that may affect their hearts and minds in a way unlikely ever to be undone." (Emphasis supplied).

In *Brown I,* the rationale was that state-compelled segregation according to race engenders feelings of inferiority in black students which precluded the possibility of "equal educational opportunity". In other words, "equal educational opportunity" was and is the right of every child which is protected by the Fourteenth Amendment.

The lack of wisdom in the forcible mixing of the races for that sake only is ably voiced by Mr. Vermont Royster in THE NATIONAL OBSERVER, March 9, 1970 edition, in his article entitled "The Immorality of Forced School Integration". Mr. Royster made the following observation:

> "There are many things wrong with the forcible transfer of children from school to school to obtain the 'proper' racial mix. It is, for one thing, wasteful of time, energy, and money that could better be applied to making all schools better.
>
> "To this practical objection there is also the fact that in concept it is arrogant. The unspoken idea it rests upon is that black children will somehow gain from putting their black skins near to white skins. This is the reverse coin of the worst segregationists' idea that somehow the white children will suffer from putting their white skins near to black skins.
>
> "Both are insolent assertions of white superiority. Both spring from the same bitter seed."

Indeed, it is ironic that the proponents of "civil rights" find it not only necessary, but desirable and Constitutionally justifiable, to apply the same uncon-

stitutional devices and rationale used by the most ardent segregationists in their quest to accomplish a desegregated, nonracial public school system.

Petitioners brief is permeated and largely supported by the rationale that the condemned "techniques of segregation" are constitutionally accepted devices to achieve an end of racial mixing, which is misconstrued by Petitioners as desegregation. On page 54 of brief, Petitioners ennumerate these techniques which were used to establish a dual school system as follows:

> ". . . school board decisions relating to school site selection, the determination of building sizes and capacities (including the use of portable classrooms) grade structures, optional zones, non-contiguous zones, and bussing were all adjusted to create neighborhoods of convenience with the structure of the legally established dual school systems."

Petitioners now press the use of these same discriminatory techniques and devices to achieve racial balance by assignment of children in Mobile County to respective schools *solely* on the basis of race. And at pages 69-70 of their brief they argue:

> "The Mobile board has made extensive use during very recent years of non-contiguous or split attendance zones with pupils transported outside their neighborhoods to promote racial segregation. The HEW plan urged by Petitioners in the Court below (Plan B-1 Alternate) would integrate all schools in Mobile by use of transportation and facilities and techniques of the *same kind* used by the Mobile board to keep the system rigidly segregated." (Emphasis added).

Petitioners are not bothered with the fact that their goal of complete integration and mixing of the races

would require the assignment of children to public schools *solely* on the basis of their race. In fact, Petitioners, in brief, promote almost every scheme imaginable to achieve racial balance by assigning children to the various schools within the Mobile School System *solely* on the basis of their race.* [34]

Congress, in the Civil Rights Act of 1964, 42 U.S.C. 2000c(b), enacted the following:

> "(b 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

And, Congress attempted to further avoid unconstitutional application of this "civil rights" legislation by enacting at Title 42, Section 2000c-6(a), the following:

> ". . . provided that nothing herein shall empower any official or Court of the United States to issue any order seeking to achieve a *racial balance* in *any* school by requiring the transportation of pupils or students from one school to another . . ." (Emphasis supplied).

In *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232, 25 L.Ed.2d 246, (1970), Mr. Chief Justice Burger, in his separate concurring opinion restated the definition of a "unitary system" as set forth by this Court in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, 24 L.Ed. 2d 19, 90 S.Ct. 29 (1969), as one "within which no person is to be effectively excluded from any school because of race or

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* [34] Example given by Petitioners in brief, page 70.

color". He further recognized the fact that this Court has not ennunciated ". . . whether, as a constitutional matter, any particular racial balance must be achieved in the schools; . . . (and) to what extent transportation may or must not be provided to achieve the ends sought by prior holdings of the Court."

The point now at issue is whether the judiciary will force the board to infringe upon the individual constitutional rights of the school children of this county and their parents—black and white—not to be assigned to schools *solely* on the basis of the color of their skin. To require compulsory assignment as sought by Petitioners exceeds any Constitutional requirement, and *solely* on account of their race, exclude children from attending nearby schools.

Deal v. *Cincinnati Board of Education,* 419 F.2d 1387 (6th Cir. 1969) addressed itself to this matter:

> "It is the contention of the appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. Appellants are not the only children *who have constitutional rights.* There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not be forced against their will to travel out of their neighborhoods in order to mix the races." (Emphasis added).

The Mobile County School System covers a very large geographical area, approximately 1258 square miles. This is one of the largest school systems in the

country, geographically. It is made up of vast rural areas and a single urban area. The school children are not distributed on a prorata racial basis throughout the system. To further examine the facts, we note that the urban Mobile area of the system contains a majority of the school children. However, the urban area of the system, containing approximately 155 square miles, is rather large.

This urban area of the Mobile system is nestled on the west bank of Mobile Bay and Mobile River on the east side of the entire county system. Within the extreme easternmost part of the urban area of the school system live the vast majority of the black children in the school system. In other words, the black school children of Mobile live largely in a relatively small, densely populated area on the extreme eastern edge of the urban portion of the system.

The present attendance zones of the school system were drawn by the courts. These zones now require many school children of both races to bypass one or more otherwise available schools to reach their respective assigned schools solely to achieve racial balance. The equal protection clause of the Fourteenth Amendment does not require even that which has been done in the Mobile County School System by the Courts. Certainly, it does not require the more radical devices advanced by the Petitioners under the guise of "civil rights".

For these reasons, among others, we think that the correct answer to the question is that racial balancing, quotas or ratios as a means to bring about enforced biracial student bodies in the public school system of Mobile County have no place. These means are inappropriate and not reasonably related to the legi-

timate ends of equal educational opportunity as required by the Fourteenth Amendment and *Brown I.* What have we gained, if, in attempting to secure equal educational opportunity for all school children, regardless of race, we violate the equal protection clause of the Fourteenth Amendment with relation to children of both races?

This question has been touched on by the Fifth Circuit in the case of *United States* v. *Jefferson County Board of Education,* 380 F.2d 385 (5th Cir., 1967).

In *Jefferson County,* supra, the Court spoke on the subject (at 404-406):

> "... There must be a mixing of the races according to majority philosphy *even* if such mixing can only be achieved under the lash of compulsion ... Accordingly, while professing to vouchsafe freedom and liberty to Negro children, they have *destroyed* the freedom and liberty of *all* students, Negro and white alike. There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law ... When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, *we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly ... embrace.* (Emphasis added).

And, in *Jefferson County,* supra, Judge Bell in his dissenting opinion saw the problem (p. 411),

> "Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so

> that all may enjoy their liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty . . . They (the majority opinion) *cast a long shadow over personal liberty as it embraces freedom of association and a free society.* They do little for the cause of education." (Emphasis added).

Petitioners' contentions and promulgations are based on the premise that balancing of the races in each of the Mobile County schools is the objective. Those contentions and objectives contravene the prohibition of the Civil Rights Act of 1964,* [35] and the Constitution of the United States.* [36] The imposition of racial quota, percentage or number requirements sought by Petitioners would be a complete denial of the Fourteenth Amendment personal right ennunciated by *Brown I.*

It is no less a denial of that Constitutional right when it is accomplished by the Courts, by simple conversion of this personal Constitutional right into a personal Constitutional duty to attend by compulsion a school to which one has been assigned solely and exclusively because of his race. Is this "equal protection of the laws"? The tragedy of our times is that this question even had to be asked in the highest court in the Land of the Free.

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* [35] Civil Rights Act of 1964, 42 U.S.C. 2000c.(b) and 2000c-6(a).

* [36] U.S. Constitution, Amendment XIV, Section I.

III.

DECLARATION OF LEGAL PRINCIPLES SOUGHT TO BE ENUNCIATED AS APPLICABLE TO THE MOBILE COUNTY SCHOOL SYSTEM.

Petitioners in an effort to have this Court declare legal principles applicable to the Mobile County School System state as their goal,

> ". . . to bring *dual* systems into compliance with the Constitution",

and ask this Court to declare certain legal principles, namely:

> "*Every* black child is to be free from assignment to a 'black' school—an identifiable racial minority school—at every grade of his education. We would define 'identifiable racial majority schools' as those which by reason of a very considerable racial concentration or racial disproportion are conceived as designed to receive black children." (page 63 of Petitioners' brief).

> "We believe that the only excuse from the general principle stated should be the case of absolute unworkability . . . or any proposal for eliminating the black schools. The available techniques of desegregation are adequate to cope with most school systems without even approaching the range of real unworkability. We have in this country available technology to integrate the schools. The concept of absolute unworkability refers only to extreme circumstances of geographical or demographic flukes—such as all-black towns far removed from whites—cases far beyond the range of concerns evidenced in the recent Fifth Circuit opinions leaving all-black schools." (pages 64-65 of Petitioners' brief).

The concept of constitutional responsibility embedded in these suggested "racial balancing" principles go

far beyond the mandates of the Constitution and of this Court in *Brown I, Brown II, Green* and other recent cases. Those cases dealt with State-compelled dual systems and under no stretch of the imagination can the Mobile County School System under the Court of Appeals order on review here in this Court be construed as a *dual* system. Nor can Petitioners' suggested principles be said to be limited to an attack on *dual* school systems, or for that matter, a desegregated non-racial school system. Their attack is on all systems not set up solely on the basis of race or color. Petitioners shift the emphasis from a consideration of the "system" to the individual black child in any given situation and quite frankly ignore any constitutional responsibility the State might have to the white children, they being pawns in this skillfully contrived scheme to insure that at no time will Negro children be without reach of a white skin, the idea being that, "black children will somehow gain from putting their black skins near to white skins."* [37]

This is perhaps the most demeaning suggestion ever cast upon the black people. Ironically, the very trait sought to be achieved by the most liberal among us—"color blindness"—has become the single distinction among all school children in the eyes of the Petitioners.

This concept subverts entirely the educational needs of the children of any given community or school district to the rigid, inflexible requirement of *racial balance* not only as to schools within the system, but each grade in each school within the system. The apparent intent is that the school be required to put its primary

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* [37] Royster, "The Immorality of Forced School Integration", National Observer, March 9, 1970.

responsibility of meeting the educational needs of the children aside in order that all children may hereafter be assigned to schools on the basis of the color of their skin. The Petitioners' proposed test of "absolute unworkability" for evaluating an alternative to racial balance is not in compliance with the Constitution. Such a test is no test at all. Sure, it would be more convenient for those far removed from the scene to determine whether or not the Mobile County School System has a racial balance in each school. It would be simply assignment by virtue of one's race. With modern technology and sufficient funding "absolute unworkability" of any balancing or mixing of the races in inconceivable, as pointed out by Petitioners in brief at page 64. However, we lose sight of the Constitutional prohibition with such undertaking.

On the practical side, perhaps the ultimate question is the financial ability of the school system to satisfy the Courts and the Petitioners short of bankruptcy. As all are well aware, the funds available for education in this southern system are far short of funds available in other states and well below the national average. Again, one must consider whether the people in this school system will support such educational system.

Next, the concepts of racial balances, quotas and percentages are alien to our basic idea of individual freedom and a free society. The most fundamental defect in Petitioners' concept is that behind each of the numbers that appear on zone charts and maps and ratios stands a child, not a chattel to be shifted about at the will of the Petitioner, the Federal Courts, or the State, *because of* that child's race or color. This concept is totally de-humanizing and totally impersonal

save for the color of one's skin. It is inconceivable that Petitioners are even seriously urging such a plan on this Court and frightening that this Court might give serious consideration to such Constitutionally prohibited schemes.

For the above reasons, among others, PTA respectfully urges this Court to pronounce the following legal principles to be followed by the lower courts in determining whether the desegregation plan in effect in Mobile County School System is in compliance with the equal protection clause of the Constitution: No child is to be effectively excluded from or assigned to any school within the system solely because of his race or color; that this Court insist upon compliance with its holding that no person is to be effectively excluded from any school because of race or color;* [38] that the equal protection clause of the Fourteenth Amendment requires that no child shall be excluded from or forced to attend any public school within the Mobile Public School System solely on the basis of race, color, religion, or national origin; that the Constitutional mandate prohibits assignment of any student to any public school solely on the basis of race or color; that racial balancing of teachers and students of any school solely on that basis is prohibited by the Constitution and has no place in a public school desegregation plan; that racial balancing be defined as any attempt by the State *to assign any child to any public school in the system by quota, ratio or* percentages solely on the basis of race or color; that the Constitution prohibits classification and assignment of students to public schools solely on the basis of race, color, religion or national

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* [38] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

origin; that desegregation means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance; that race or color should have no significance in assigning students to schools within public school systems; that the Constitution does not authorize any State to assign children or any Court to issue any order seeking to achieve racial balance in any school and within such school by requiring the transportation of students from one school to another or one school district to another in order to achieve such racial balance; that racial balancing in a public school system is repugnant to the Constitutional mandate; that hereafter all children in the public school system shall be assigned to respective schools within the system without regard to race or color.

The legal principles requested here will no doubt be criticized by some as a retreat. Such is not the case nor the intent of this request for to adopt the principles suggested by PTA will do more to restore and retain individual dignity of all races than those color-criteria plans urged by the Petitioners. By announcing these legal principles, this Court will go far toward achieving permanent integration in this free society, rather than add to the turmoil, confusion and chaos that presently abounds in virtually every local school system and will avoid the inevitable oppression which will result from any consideration and acceptance of the concepts urged by Petitioners.

By adopting these above legal principles, men of good will may go about the task of learning to get along with one another in an atmosphere conducive to

education rather than turmoil and oppression. To announce these legal principles will be to ratify the guidelines that Congress laid down in the field of desegregation. True, the enunciations of Congress reflect a legislative compromise of conflicting ideas of men of good will, but the strength of our system is in the progress we have made through just such compromise. The legislative history of Title IV of the Civil Rights Act of 1964 reflects the problem that the Congress had with the issue of racial balance as an end in itself as opposed to desegregation:

> "The committee, therefore, authorized in Title IV the Commissioner of Education to extend technical assistance to school boards and school personnel where such assistance would aid in solving problems of desegregation. The committee failed to extend this assistance to problems frequently referred to as 'racial imbalance', as no adequate definition of this concept was put forward. The committee also felt this could lead to the forcible disruption of neighborhood patterns, might entail inordinate financial and human cost and create more friction than it could possibly resolve."* [39]

The Court must be responsive to the changing times, but it must also be responsive to the realities of day to day life:

> "We must leave to the legislature the task of reform in broad areas of the law and the writing of social legislation to meet the needs of a changing society."* [40]

This is but a plea of moderation, not a retreat from responsibilities and human dignity that each man owes

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* [39] 1964 U.S. Code Cong. and Adm. News., p. 2508.

* [40] M. Leigh Harrison, "The Law and the Changing Times", 16 Ala. L. Rev. 7.

to his brother regardless of race by commandments of the highest order. But then, is a plea of moderation one for which an apology must follow? Judge Learned Hand observed that "a society so riven that the spirit of moderation is gone, no court can save; a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."[41]

The District Courts afford the proper forum for determining whether a local public school plan accords to all children their Constitutional guarantees. New ways are being devised to assist District Courts in their consideration of the problems presented in desegregation cases. One such device is the appointment of a biracial committee that effectively brings to the attention of the local boards and the District Courts local opinions from both races. This device is in effect under the Fifth Circuit plan, which is now under review by this Court. It is respectfully submitted that this device is insurance against retreat for the races have the same number of representatives on the Committee.

The legal principles we here seek can be the foundation upon which a great society can be built for inherent in the requested principles is the very Constitutional concept that:

> "So long as he does not encroach upon others, no man shall be compelled to walk where he would not walk, live where he would not live, share what

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[41] L. Hand, "The Constitution of an Independent Judiciary to Civilization, In the Spirit of Liberty", 155, 164 (I. Dillard ed. 1960).

company he would shun, think what he would not think, believe what he believes not."* [42]

In *Brown I*, the facts and the issues were such that the decision was obvious to all save arch-segregationists. Here the Court is being asked to impose on the State, through local school boards, the affirmative duty to needlessly and at great expense transport children, often against their will, for considerable distances not for any educationally defensible reason, but solely to achieve racial balance. It should not be required.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court should declare:

1. That no child is to be effectively excluded from or assigned to any school within a school system solely because of his race or color;

2. That the equal protection clause of the Fourteenth Amendment requires that no child shall be excluded from or forced to attend any public school solely on the basis of race, color, religion or national origin;

3. That the assignment of any student to any public school solely on the basis of race is prohibited by the Constitution;

4. That racial balancing be defined as any attempt by the State to assign any child to any public school within the system by quota, ratio or percentages solely on the basis of race or color;

5. That desegregation means the assignment of students to public schools and within such schools

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* [42] Royster, "The Immorality of Forced School Integration", National Observer (March 9, 1970).

without regard to their race, color, religion, or national origin, but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance;

6. That the Constitution does not authorize any State to assign children or any Court to issue any order seeking to achieve racial balance in any school and within such school by requiring the transportation of students from one school to another or from one district to another in order to achieve racial balance; and

7. That the assignment of children to the public schools of a district and within a school shall be without regard to race or color.

Respectfully submitted,

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APPENDIX

STATISTICAL TABLE ON DESEGREGATION IN THE MOBILE COUNTY SCHOOL SYSTEM

	1962-63	1963-64	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Total number of schools	89	93	95	97	98	96	91	89	83
Total number of schools with a biracial student body	0	1	3	10	15	34	57	68	76
Total number of schools with a biracial faculty	0	0	0	0	0	10	89	88*1	82*1
Total number of students enrolled in the system	73949	76615	78652	77887	77101	76090	75464	73504	68623
Total number of students enrolled in biracial schools	0	3056	4004	10474	15636	28558	47560	55314	64306

*1 The one school without biracial faculty is Dauphin Island School, a one teacher school on an island in the Gulf of Mexico.

STATISTICAL TABLE COMPARING DESEGREGATION PROCESS IN THE MOBILE COUNTY SCHOOL SYSTEM TO THE ACHIEVEMENT OF FOURTH GRADE STUDENTS ON THE CALIFORNIA BATTERY ACHIEVEMENT TEST

	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Total number of schools	97	98	96	91	89	
Total number of schools with a biracial student body	10	15	34	57	68	
Total number of schools with a biracial faculty	0	0	10	89	88	
Total number of students enrolled in biracial schools	10474	15636	28558	47560	55314	
Systemwide achievement level (4th grade students) California Battery Scores as compared to grade placement. (grade placement equals 100%).	104.4%	100%	99%	91.5%	89.7%	